# WORKERS' COMPENSATION INDUSTRIAL COUNCIL

# JUNE 15, 2006

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, June 15, 2006, at 3:00 p.m., Charleston Civic Center, Rooms 207-209, 200 Civic Center Drive, Charleston, West Virginia.

Industrial Council Members Present:
Charles Bayless, Chairman
Bill Dean, Vice-Chairman
Dan Marshall
Walter Pellish
Rick Slater

## 1. Call to Order

Chairman Charles Bayless called the meeting to order at 3:00 p.m.

## 2. Approval of Minutes

Chairman Bayless: The first item is the approval of the minutes of the meetings held on March 24 and May 3, 2006. Any comments?

Dan Marshall made the motion to approve the minutes from the March 24 and May 3, 2006, meetings. The motion was seconded by Walter Pellish and passed unanimously.

## 3. Office of Judges Report – Timothy G. Leach, Chief Administrative Law Judge

Judge Timothy Leach: Mr. Chairman, members of the Council and members of the public, I am presenting to you a verbal presentation of a much reduced in size statistical report. I do have a rough draft of the report without all the zeros. It has really cut down the size of the report from 20 pages per section to about three or four. I did want to report verbally again on some of the trends that we are seeing and some of the issues raised by these numbers.

The first chart that you have breaks out the numbers of protests per claim type, fund type – old fund, new fund and self-insured. I did want to point out two things about that report. Under "others" you see nothing reported. "Others" refers to the uninsured fund, the security risk fund. . .I can't name them all. There are five or six special funds besides "new fund." We don't show that we received any protests involving those funds, but I cannot say for certain that my staff is aware of those types of funds and have entered them into our system as "special fund." We've

asked the administrator, which is BrickStreet Administrative Services, to use a special form type or special letterhead or something to identify for us this is a special fund. I don't know if that is working yet or not. I would have thought that five months into the process we might have started to see some of those show up. The other peculiar number about this report is the box in blue – the 250 with the asterisk beside of it – I tried to explain that in my footnote. We implemented a new policy on May 1 which actually aligns itself with the statutory change that was done in January of 2005 requiring a protest to be sent to all the parties and to the issuing authority, whether it was BrickStreet or a self-insured employer. So we started requiring that to be met on May 1 and a lot of people were still doing it the old way without sending copies. That worked when we shared a computer system with Workers' Compensation. It doesn't work when we don't share a computer system with BrickStreet so we had to implement this change. What we did was we sent out notices in most of these 250 saying, "You have to send a copy to BrickStreet or you have to send a copy to the employer, the claimant. And as soon as you show that you have sent us a copy then we will receive and acknowledge your protest." So 250 of them in May kind of got snagged up in that situation.

The next graph shows that our number of protests continues a three year decline. The chart after that on the next page shows that for each month for the first five months our protests are down. The Protest Changes by Issue Type chart shows that we're down 2,643 protests for the same five month period from last calendar year. Those numbers in yellow are the big drops. The particular categories are treatment denials, treatment grants; PPD is down 922, that's over a third of our drop in one category alone; and the OP caseload is way down, 274 down. So, we're down 31% from the same time period last year, but it seems to have been centered on basically four different issues. I've mentioned in my self-insured report the number of self-insured protests have held level at 228 or so a month from the same period last year. The BrickStreet protests are down. We really don't know why that statistic is to that extent.

The Pending Caseload Report – Because the number of cases coming in the door are dropping and the number of cases going out the door are staying high, our pending caseload is now down to an all time low – 11,774. When I started tracking this, which was around May 20 when we were audited last year, it was over 15,000. Mr. Pellish asked me why there are 17,000 cases pending. I said it's already down 1,000. It's going down. So now it is way down from 18,000 to 11,774. I can't reach zero. We'll always have cases pending. We just don't know where the bottom floor is for that number.

Acknowledgement Timeliness – I am pleased to report that for May our acknowledgement timeliness exceeded what we did for an average in 2005 and our acknowledgements within 10 days or less was 94%, which far exceeded the 91% we did last year. You can see from that graph we had a huge drop at this break point caused by our IT problems in January and February. And now the last couple of months we're back up to running where we have been for the three years previously.

Final Decision Timeliness has begun to creep back up. This is now Chart F. For May it was only 1.6% untimely which compares very favorably to our average of last year which was

1.4% untimely. So, 98.4% for the month we're timely and our year-to-date has crept up to 96.0% timely. I also highlighted in May we got 43.8% of our decisions out within 30 days of assignment to a Judge and for a year-to-date 49.0% compared to last year when it was 35.0%. I think we are doing a good job in turning around the decisions from when we give them to the Judges.

I did mention briefly the self-insured protest levels. The numbers are the same as last year. The percentage of the overall protests we're getting in is going up because the BrickStreet numbers are dropping. Even though we still have the same 228 or so a month, that now represents almost 21.0% of our total caseload whereas last year it was only 14.0%. That doesn't reflect a change in self-insured. That reflects a change in fewer numbers from the BrickStreet side.

After I prepared the written version that I sent you last week, I managed a change in the report format. We have several hundred different protest category types for which we have no protests. So we just took out everything that had a "0" in it. The report only has the positive numbers, so the report gets much slimmer.

The geographic analysis of where our protests come from. . .as I said this was a case of the boss promising more than could be delivered without knowing what I was talking about, but we are working on that. When I suggested to Mr. Pellish he might have some interest in it, he agreed. And I thought we had zip codes in counties of employers listed. We don't. We are going back and retroactively putting that into our database. Once it has been retroactively put into our database then we can prepare a report showing which county each protest comes from – either from the claimant, where the claimant resides; or from the employer, where the employer's place of business is.

Staffing Levels – I reported to you last time that because of the drop in the number of protests we have to take a close look at our staffing level. We gave up three more positions since I last reported to you. We are now down about 23% from where we were at our high water mark in terms of either permanently giving up positions or vacancies. We are still going to have to keep analyzing that figure.

Last, although not in my report, just a couple of days ago the Supreme Court – this is sort of in closing business – the Supreme Court issued their decision on the widows' benefits that we started talking about in January. I have a copy if any of you are interested. But basically the Court upheld the position that we had taken about the interpretation of the law and the position that was adopted by the Governor and Commissioner Cline. Everybody is now on the same page and that decision has been rendered and I believe its styled Lola Crist et al. vs. Jane Cline, Insurance Commissioner. Any questions?

Walter Pellish: Judge, on the staffing levels, I'm not clear. You have a statement that 15 of those positions are currently vacant. What I'm not clear on is how many positions are you authorized to have at his point?

Judge Leach: Well, currently we are authorized 129, but about 15 of those. . .it goes up or down depending on if we've hired someone or not. What we are finding is we're adequately staffed at some types of work; we're inadequately staffed at other types of work; and we are over staffed at some other types. So we're trying to reach a balance. Where we are adequately staffed and we have a vacancy we don't bother to replace that position. Where we are inadequately staffed – one or two positions – we are posting those for hiring so they will not remain a vacancy. We've already started the administrative and bureaucratic process of hiring – posting the position, scheduling the interviews. We are filling one or two of those 15 vacancies. What we do, as I described to my staff, is we kind of put that vacancy in our pocket for a few months and determine if this is a permanent change or trend or just a pendulum swing. So we have to make a guess. If it's a permanent down trend then we need to give up the positions. We don't need to be budgeting for those positions.

Mr. Pellish: When do you budget for next year?

Judge Leach: When we were part of Workers' Compensation and the BEP Program the budget process would start in April and finish up in May for the July following. . .15 months away. So we would start preparing our budgetary needs and submit it to the Workers' Compensation Commission and then submit it to the Board of Managers so that they would be prepared in December of that year to submit a budget to the Legislature which then would meet in January and authorize any changes or approve the budget, which started in July. Our budget was set by Workers' Compensation for the first year and a half of our attachment to the Insurance Commission. We have not started working on the July 2007 budget yet and we are already past when we would have done that with Workers' Comp. But frankly I wish the Commissioner were here to address that. I do not know what her game plan is for budget and how Division heads work with the budgeting process.

Mr. Pellish: I think it would be helpful if you're going to comment on staffing levels, comment where you are versus the budget. That's a meaningful measure.

Judge Leach: Sure. Our 15 positions is probably close to 15% and our budget is about 50% personnel and 50% non personnel. . .doing some rough figures. Fifteen percent personnel might translate into $600,000.00 out of an $8 million dollar budget.

Mr. Pellish: Significant.

Judge Leach: Yes.

Chairman Bayless: Does any member of the public have any questions for Judge Leach or comments on the material he presented? Thank you.

**4. Proposed Amendment to Rule 13 – Mary Jane Pickens**

Mary Jane Pickens: As you recall this proposal is being brought forward as a result of the last meeting. When we originally proposed the Procedural Rule – the rule as it was originally drafted – we had a provision in there in subsection 4.10 that required a certain number of voting members of the Council to be physically present at meetings. The number that was originally in there was "two" and that was just something I did because it was the same relation to what the required number was for the Board of Managers when the Board of Managers was functioning. There was a desire – very understandable – to maybe have three people. So we went ahead and made that change. In hindsight it would have been pretty easy for me to guess about weather, people traveling and getting on airplanes and driving, and we ended up having problems at the last meeting. In order to address that it is our proposal to take it back to two. Obviously you still have to have a quorum but folks can call in. I've been working with Margaret Rice. We've had a request from Mr. Slater to set up a standing call-in, and we are kind of addressing that right now on a meeting-by-meeting basis. But we'll make sure that people, if they're unable to be here, have an opportunity to call in on a number that we've established through an operator prior to the meeting. I think we can address the attendance problem and it is our recommendation to go back to the "two voting members" being present. And that would be a change that is in subsection 4.10, and I think that our secretary put yellow highlights over it. It strikes out the word "three (3)" and adds "two (2)."

Chairman Bayless: Thank you. The procedure is this is the first reading. If any member of the public or anybody else has any comments on this, please get them to us and it will be considered.

Ms. Pickens: Correct. What we would need to do – even though it's a small change – you have to go through the whole process. The Council will need to vote to file it for public comment.

Chairman Bayless: We need a motion to have this proposed rule change filed for public comment.

Mr. Marshall made the motion to file Series 13 for public comment. The motion was seconded by Mr. Pellish and passed unanimously.

Ms. Pickens: Thank you.

**5. Rule 12, Relating to Unconscionable Settlements (Final Filing) – Ryan Sims**

Ryan Sims: Chairman Bayless, members of the Industrial Council, just to save you a little bit of time, I'm going to be presenting two rules. First, Rule 12 for final vote and the next item on the agenda will be Rule 9.

Chairman Bayless: That's fine.

Mr. Sims: As you know at the April meeting we were in the public comment process for Rule 12, and your April meeting concluded that public comment process. There was a fair amount of dialogue during that meeting, very productive dialogue. Based on the comments either given to us during that meeting or received in written form from the Insurance Commission we have made some changes to Rule 12. We think we've produced the best possible version of this rule based on the mandate of the Legislature to have settlements reviewed after the fact for unconscionability. You should have a copy with highlighted portions in yellow with changes we've made. I want to touch upon the most significant changes we made since the conclusion of the public comment period.

Page three of the rule, subsection 3.3 through 3.8 – All of these definitions were added because we felt it would provide more clarification to the rule. Because of the nature of the Code in regard to what you can settle, particularly in regard to medical claims, we felt it would be appropriate to define these terms – "orthopedic occupational disease, nonorthopedic occupational disease, occupational exposure injury and occupational disease." We were fortunate to have the assistance of Dr. Becker, who is at BrickStreet, in giving us what we believe are some medically accurate definitions and they will assist the Insurance Commission and the designated Hearing Examiner in giving settlements in regard to these medical terms. If anybody has any questions, feel free to ask. The next significant change I wanted to discuss is on page four.

Chairman Bayless: Can I interrupt you? I'm sorry. I was out of the country at the last meeting. It says, "An orthopedic occupational disease may affect one or more component parts of the. . ." What if somebody says, "I have lung disease," and that may affect a muscle or a bone. To me it would be better if it said, "Does affect one or more components. . ." I'm not a doctor.

Mr. Sims: We had Dr. Becker's advice on this because we really didn't have any medical expertise either. I think Dr. Becker was involved in the former HCAP so we deferred to him on that. Moving on to page four, the next significant change I want to discuss is subsection 3.10 where we added a definition to describe an employer that is not active in the claim. This has probably been the most controversial aspect of this rule. There was a significant amount of public comment and comment from stakeholders on this topic. The issue is basically to what degree an insured employer should be able to have its own standing so to speak or its own signatory authority in regard to the settlement of a workers' compensation claim. At the Insurance Commission we've really gone over this issue a lot and we feel, based on the statute §23-5-7, that it should really be the insurance carriers' job to settle the claim, and that is

consistent with how other areas of property and casualty insurance work. We feel §23-5-7 gives us that leeway by interpreting this phrase, "An employer that 'is not active in the claim'. . ." as meaning an employer that is insured. Again, just to give you some background the way it works in other areas of property and casualty when there is litigation occurring, for example in automobile insurance, the insurance carriers. Generally most contracts permit to settle the claim for any amount up to the policy limits and they do not have to get signature from their insurer to do so. Now as a general business practice most insurance companies do work closely with their insurers. It benefits them and it benefits their insurers. Nobody wants to pay out more than they should pay out on a claim. So, as a general practice, a workers' compensation company will work closely with the insured just as good business. You want to work with your insured employer and get the facts from them and work with them in settling the claim for a fair amount, not overpaying. But, again, the Insurance Commission feels that this is the best way to address this issue, particularly in light of the upcoming open market in 2008. Now there has been an argument made, based on a separate statutory section, which employers are given specific authority under the Code to be parties in the litigation, meaning before the Office of Judges. It has been argued, because of that, that carriers would have the opportunity if the employer decided to protest the carriers' decision. Again, this is something that usually only occurs in other property and casualty. . .but our Legislature deems it is appropriate in workers' compensation. The argument has been made if an employer decides to protest it, it's the insurers' decision and the insurer will sidestep it and settle the case. We understand that concern by employers. But, again, in light of the open market in 2008 and the goal of creating a workers' compensation market that is consistent with the way other states' market look, the Insurance Commission believes, in regard to settlements, it's appropriate only to permit the employer to be involved in settling the claims to the degree that the insurer permits the employer to be involved. Again, we believe pursuant to just good general business practices, normally the insurer will want to work closely with its employer and let the employer factually remain active in the claim. But we don't believe it's appropriate to let the employer have to separately sign off on settlements. Specifically what we did in creating this definition, we said generally an employer that is insured isn't active in the claim. Well provided that if in the terms of the particular insurance contract it said the insured employer is permitted to be a separate signatory participant in the settlement and is allowed to sign off on all settlements, then that's allowed. In other words it will go according to the terms of the insurance contract. That's the way it works in most other states. In medical malpractice insurance there were some policies where doctors who were insured in medical malpractice policy were able to sign off on a settlement and if they didn't like the settlement they would go to trial. So there have been contracts like that. Whether there will be any in the realm of workers' compensation, I'm really not sure, but it has occurred before. Are there any questions on that aspect?

Chairman Bayless: In some areas of insurance there is a rule that if an insurance company turns down a settlement within the policy limits and later it turns out that there is a judgment that's greater than the policy limits the insurance company is liable for the greater amount because they turned down the settlement. Is that encompassed in any Code section? Do we need to have something like that here? Or is that somewhere else in the law that we don't need to have that if we do want to have that?

Mr. Sims: I think that's a pretty good question. Fortunately there is a pretty simple answer to it. Workers' compensation is different than other areas of insurance. There really are not policy limits so to speak. Other insurance will have a million dollar policy limit, $500,000.00 policy limit. And you are absolutely right. In other lines of casualty if there are issues where the litigation might go beyond policy limits, then the opportunity does arise where the plaintiff, to protect their own interests which then become adverse to the insurance company, may want to get their own counsel. Then the situation you said where a couple of West Virginia Supreme Court cases . . .if there is an offer of judgment and settling for more than the insurance company. . .Unfortunately, we don't have those problems in workers' compensation because there are no policy limits. The benefits go according to the Code.

Mr. Pellish: Mr. Chairman, I have a comment on this. I'm not sure I agree with the conclusion that the insurer is at all times going to act along the lines that the employer would. I don't mean that in terms of them having different goals or different agendas. It's just that I think there are cases where the insurer may not really understand what is going in the industry and the employer should have a voice in terms of what the settlement is. I think they ought to be part of the process. Secondly, the comparison in terms of other property and casualty insurance doesn't really jell with me in this. We're talking about people and I think there is a major difference.

Mr. Sims: Your comments are well received. We thoroughly reviewed this issue. One of the driving forces behind this decision was in other states this how it works in workers' compensation – the forms promulgated by NCCI. The current form we have that BrickStreet is using does not give the employer the ability to act in the settlement claim. We have a goal to do things like other successful states do in this realm. Again, your point is well taken and the arguments you made are much like the arguments made by some of the stakeholders. I think we presented to you the reasons we have it this way and why we have it this way, and again it is also addressed in the overall general response that we made to the comments. It is thoroughly addressed there and of course the vote is up to you all.

Mr. Marshall: Mr. Chairman, I have a concern. If we invite employer participation, it might affect the market and disincentives some carriers from coming into our West Virginia market. One of our goals should be to encourage as many providers as possible to come into our market. I think that in the end will benefit the employer community as well as employees.

Mr. Sims: I think that is also a very good point. Since the end of the public comment period we specifically contacted several major property and casualty trade organizations, such as Nationwide, Liberty Mutual, that provide workers' compensation insurance among other lines of casualty. We asked them that precise question – is this something that would bother you if we permitted the employer to have equal standing in the settlement? The feedback we got was essentially unanimous that, "no they do not want the employer to have equal standing in regard to settlements." That would be very different than the way it's done in other states. It would be contrary to the standard NCCI policy and could potentially cause some hesitancy of these major

carriers to come in, and of course that is a major concern. Like you pointed out, Mr. Marshall, we want many prominent carriers to come in, in 2008, with good reputations to do business in our State. We anticipate at this point that that will occur and that was part of the reason we are doing it this way in this rule.

On page seven, we are looking at probably the most major change in this rule which is this section that sets forth the actual standards for unconscionability. This is the other big issue that we had in regard to the comments we received on this rule and that is, "what should the standards for determining unconscionability be?" There has been some expression by the Council that they don't like the term "unconscionability." While the Insurance Commission doesn't necessarily disagree that, that is the term the Legislature left us with. It is a term that's been around in common law for a long time and we've done our best to try to create standards that are consistent with what we think would be proper standards for the Hearing Examiner to use in reviewing settlements.

We really made two major changes starting with Section 14.2. There are some stakeholders that were troubled by the language "clearly unfair." In other words it would be fairly easy to argue that some settlements are "unfair," meaning somebody got a better bargain than somebody else, but that doesn't make it unconscionable. We took that out and replaced that with, "if the terms of the settlement shock the conscience." So our general standards are that it has to constitute a "gross miscarriage of justice or that it has to shock the conscience." We think those are stronger standards. We think those will give the Hearing Examiner more guidance. In other words, rather than being "clearly unfair" we think those are stronger standards – "shock the conscience" or "gross miscarriage of justice." We think the terms of the settlement will really have to jump out at you based on those standards. Although there was some concern over it, we did leave the five standards set forth in the *Art's Flowers* case in there. They are set forth by the Supreme Court. We did give this a lot of thought. We felt it would be best to leave those in there, particularly in light of the fact that at some point it is very possible that the decision at the Hearing Examiner level could reach the Supreme Court and the Supreme Court would certainly want to look to their own precedent in determining whether a settlement was unconscionable so that is why we decided to leave those factors (a) through (e) in there and then we added three others. And those last three are essentially what we describe as procedural aspects – more like factually what went on with the settlement. You can look at (f) "whether the claimant was provided ample opportunity to read and review the settlement. . .;" (g) "whether the claimant was not informed of his ability to obtain a lawyer. . .;" and (h) "whether any of the material terms of the settlement agreement were not conspicuous." One of our commenters said that there should be some procedural standards in here too. In other words, can we look at the facts of what actually occurred when the settlement took place in addition to these general standards from the *Art's Flowers'* case? So we decided to add (f), (g) and (h), taking into account their comments. We believe factors (a) through (h) thoroughly, to the best of our ability, address the term "unconscionability." Again, it is not the best term, but it is what the Legislature left us with and we think we've done our due diligence in trying to create new factors.

Rick Slater: Ryan, is "shock the conscience" a legal definition, a legal term?

Mr. Sims: That term "shock the conscience," I'm not sure if you would find it in *Black's Law Dictionary*, if that's what you are asking. It's a term that is often used in legal opinions and that type of thing. I know courts have used it. It is somewhat synonymous. You might have heard the term "chilling." Often courts use that as well. It's a term of our legally speaking.

Mr. Slater: I like it.

Chairman Bayless: On 14.54, Procedure for Review, it says, "Any claimant who believes that a settlement entered into while the claimant was unrepresented by counsel is unconscionable may. . ." Is that going further than the Legislature? Did they just say look at unconscionable settlements or only settlements while they weren't represented by counsel?

Mr. Sims: I believe that is consistent with §23-5-7. I think they can only obtain a review if they were unrepresented at the time. If they were represented by counsel, I don't think the Legislature intended for there to ever be any review of the settlement.

Chairman Bayless: So they have to get a lawyer for malpractice?

Mr. Sims: I didn't want to say that, but that's correct. That would be the remedy.

Mr. Marshall: Mr. Chairman, I'd like to ask you a couple of questions. I see in 14.2(a) you added the word "bargaining." Was that to clarify the intent there?

Mr. Sims: That's correct. It is slightly different from the *Art's Flowers* case, but we felt if you are going to use the word "position," if it is used in factor (b), you should add it in factor (a) as well just to be consistent. More of kind of a semantical type of thing. I don't think it has any major substantive impact.

Mr. Marshall: And then in (g), "Whether the claimant was not informed of his ability to obtain a lawyer. . ." It seems to me it would make more sense to say, "Whether the claimant was informed" rather than "was not."

Mr. Sims: You could probably state it either way. It might read a little better if it states "not." I guess what we're trying to say is if "the claimant was not informed," that's a major factor to persuade the Judge that it might be unconscionable. In other words if we just handed it to him they weren't told they had the ability to obtain counsel, that type of thing. If you want us to change that we can.

Mr. Marshall: Could you explain to me what your intent was in using the word "conspicuous" in (h)?" That's one of those sort of amorphous and very subjective terms that I think worry some of us.

Mr. Sims: Absolutely. I think what that is referring to is how the physical settlement, meaning the settlement as written on paper looked. In other words, were there terms of the settlement which are unfavorable to the claimant which were inconspicuous in very small print, perhaps at the bottom of the page or barely legible. . .fine print. I think that is what is being referred to in that particular standard.

Mr. Marshall: Does that put us in the position of regulating what size of "type" people use in their agreements?

Mr. Sims: Well, I would think it could be more of a common sense thing. That is to say, when the Hearing Examiner is reviewing it if something is in "two font" that might be considered rather inconspicuous. I think we consider a 10 or 12 font standard. But, again, I'm not sure we are going to get to the minutia of discussing particular font size. I would hope at least for the Hearing Examiners that would be more of a common sense type matter.

Chairman Bayless: Let me ask you a question about the word "bargaining." Is that too restrictive? Let me give you an example. If ABC Insurance Company, which is a New York stock exchange company with zillions of dollars, goes up against somebody in the hollow with a third grade education, I would say that clearly if it says "the relative position of the parties. . ." But if you say "bargaining," I would say well they have the same "bargaining position," but their knowledge. . .capacity. . .their position. . .I just wonder if "bargaining" isn't too limiting?

Mr. Sims: I follow to some degree with what you're saying, Chairman Bayless, but I think actually the term "bargaining position" is much like the term I was discussing – "shock the conscience." That's a pretty common legal term "bargaining position." I think it includes what you are talking about. . .the intellectual ability. I think it includes all of those subjective things.

Mr. Pellish: I share the same concern as you do. I don't think the word belongs there.

Chairman Bayless: To me it limits bargaining limits. . .the word "position" or you wouldn't put it there.

Mr. Pellish: In the case of workers' compensation "position" should be equal and it shouldn't be a matter of "bargaining."

Mr. Sims: I'll remind you that you are voting on this rule, so if you want to make some changes to it before you vote, you are certainly permitted to do so.

Chairman Bayless: Let's go through it and then we'll hear from the public and then if there are any motions to change anything we will be happy to entertain them.

Mr. Sims: The last significant change I wanted to discuss is in 14.4. It describes the procedure for review. What's most significant in this section is the scope of the time which you can have a review. Probably the third most significant comment we received from stakeholders is there is no statute of limitations in here. I haven't talked to anybody who disagreed that there should be. That is to say there should be a time limitation for a claimant to come forth and say, "This settlement is unconscionable." After talking to everyone involved this was sort of a compromise time. Some people were saying more time than this. Some people were saying less time. So we came up with the 180 days which is approximately six months. Within six months after entering into the settlement you can make the petition and argue that the Insurance Commission reviews for unconscionability.

The other change towards the bottom says, "That a claimant may within one hundred eighty (180) calendar days of _____. . ." There are a couple of blanks there. Basically from the effective date of this rule any settlement entered into after January 29, 2005, when the Legislature essentially took away the ability to review settlements of the Office of Judges and placed it under the Insurance Commissioner's province were permitting the claimants to have settlements reviewed within 180 days of the effective date of this rule. So there is no time gap where there was no ability to have settlements reviewed. That's why we did this. When we file this with the Secretary of State's Office, the Secretary of State gives us an effective date that will be placed in these blanks. With that, that's our final draft version of the rule that we are presenting to you.

Chairman Bayless: Thank you very much.

Mr. Sims: I'm not sure if you want to do each rule separately or would you like me to move on?

Chairman Bayless: Let's do each one separately. Does any member of the public wish to offer any comments on the proposed rule? At this point, Mr. Sims or Ms. Pickens can keep me straight to the correct procedure. Should we have a motion at this time to adopt it and then discuss amendments? Would that be correct?

Mr. Sims: The proper procedure would be to move to adopt to final file the rule and then discuss the amendments, or you can do it vice versa. But I think it would be better to adopt the rule and then clarify which amendments you want.

Chairman Bayless: Do I hear the motion to adopt the rule?

Mr. Pellish made the motion to adopt Rule 12. The motion was seconded by Mr. Slater and passed unanimously.

Chairman Bayless: Now we will turn to anybody that has any proposed amendments from the Commission that they would like to offer to the proposed rule.

Mr. Pellish: Mr. Chairman, I would propose deleting the term "bargaining."

Chairman Bayless: Commissioner Pellish proposes that in 14.2(a), the word that is highlighted in yellow, the statement says, "The relative bargaining position of the parties involved in the settlement at the time the settlement was entered into." Commissioner Pellish's motion is the word "bargaining," and to get the motion on the floor I will second it so we can then have discussion.

Mr. Slater: Walt, will you clarify for me the reason for that?

Mr. Pellish: I think both parties have equal weight in their positions when they are in this situation and I think the term "bargaining" would allow somebody to misconstrue what happens here – that it's the strength of somebody's "bargaining position" that could influence the outcome and it should not be a matter of bargaining. It's a matter of the conviction of someone's position. Not the depth of their pockets so to speak.

Chairman Bayless: I think if you look at the word "position," there are a lot of things expressed in it. It's not only "bargaining position." It may be an economic position. It may be intellectual position. It may be everything. And to me the word "bargaining" limits it. Now on the other hand, as Mr. Sims' said, that is a well crafted legal word that means all of those things, I have no problem with it. I think "bargaining" limits it and I would take the word out also. But on the other hand if it turns out that it means all of that. . .

Mr. Slater: Mr. Chairman, it seems like the entire criteria could be misconstrued or construed in several different ways whether there is "bargaining position" or just "position" or take that out and put some other word in. A crafty attorney is going to be able to do whatever he or she wants to do with that. So I'm not sure there is that much significance. . .I don't have a problem with certainly the motion.

Mr. Marshall: Mr. Chairman, like yourself and Mr. Pellish, I would feel more comfortable if we deleted the word.

Chairman Bayless: It has been moved and it has been seconded that the word "bargaining" in 14.2(a) be deleted. All in favor. Opposed? The "aye's" have it. The motion is passed. Are there any other amendments or changes that anyone would like to propose to the proposed rule? We have already adopted the rule so we don't need to go any further. We had one amendment.

Ms. Pickens: Procedurally we should have had a motion on the floor to final file it and had discussion and I don't know that we did it necessarily right. We could have amended the motion to final file it as discussed during the meeting. But I understand clearly the intent is to final file it with the deletion of "bargaining."

Chairman Bayless: Since we adopted it and then opened it for discussion and then had the amendment, for the belt and suspenders effect why don't we then have another motion to adopt the rule for final filing as amended.

Mr. Marshall: So moved.

Mr. Pellish: Second.

Chairman Bayless: Any discussion? All in favor signify by saying "aye." Opposed? Series 12 passes.

Mr. Pellish: Mr. Chairman, I would like to add a comment thanking Ryan and other staff members for effectively dealing with an extremely difficult subject.

Chairman Bayless: I agree. If you look at the first rule, I think a lot of people on every side of this issue – and there were more than two, there was about ten – had very valid concerns. I think you did a very good job in going through them and getting to a final rule that addressed those concerns. If you remember the first time this was brought up and the word "unconscionable" was brought up, people were going every way.

**6. Initial Presentation of Rule 9 (Uninsured Fund) – Ryan Sims**

Mr. Sims: Thank you, Chairman Bayless. I appreciate your compliments. I'd like to tell you that all of the rest of the rules will be much easier than Rule 12, but I think I would be lying about that.

We are here today to present Rule 9. Previously it was a rule dealing with a totally different topic that was sunsetted on January 1. That's why we are putting it in Rule 9. We're essentially replacing it with a rule on a totally different topic and that topic is the Workers' Compensation Uninsured Employers' Fund. This rule is to set forth some administrative procedures and standards for the administration of the West Virginia Uninsured Employers' Fund.

In the first section I essentially set forth the Scope and the Authority, which is pretty much standard in all of these rules. In Section 2 you also have the specific statutory authority for the Uninsured Employers' Fund which was created by the Legislature as part of the privatized workers' compensation system. Just to give you a general synopsis of what the Uninsured Employers' Fund is – I am sure you have heard the term before but you might not know exactly what its purpose is or what purpose it serves – it is a Fund that the Legislature created to pay the claims of employees who are injured in this State when their employer should have been carrying mandatory workers' compensation coverage but was in noncompliance with the law. So that's essentially what the Fund is for and it was funded with $5 million dollars of initial

funding from the former Workers' Compensation fund. So, on January 1 we started with $5 million dollars, and there are other methodologies for continuing to fund it as needed which will be addressed in other portions of this rule.

Moving on to Section 3, it sets forth some definitions. They are pretty basic definitions. At the top of page three, 3.4 defines the "Fund" as the Uninsured Employers' Fund, so anywhere in the rule that refers to the "Fund" it's referring in this rule to the Uninsured Employers' Fund. As you probably know, there are also various other funds. I think you heard Chief Judge Leach refer to the term "Special Funds" and that's kind of a general term we've coined to describe all of these funds that the Legislature has created as part of this transition, such as the Old Fund, New Fund, Self-Insured Guaranty Fund, those various funds. In this rule when it says the "Fund," it is referring to only the Uninsured Employers' Fund.

Section 4 sets forth the process for applying for benefits. We already have on file an application that a claimant can use to apply for benefits from the Uninsured Employers' Fund. Right now the Fund is being administered by BrickStreet TPA Services. It is part of our agreement we have with them through the end of the year and we will possibly renew it. We will always be using a TPA, either BrickStreet or another TPA service to administer all claims under the Uninsured Fund. The reason I'm pointing some of these out is this isn't all addressed in this rule. This rule is more to just set forth administrative procedures and that type of thing and it doesn't involve every aspect of the Uninsured Fund. So when I chime in with something that is not in there that's why I'm doing that – just to give you the background. Section 4 describes the process for applying. We've had this application available since January 1, but it puts in writing the whole process. As you can see, if you read through that section, we have five business days upon receiving an application to determine whether the named employer in the application was or was not insured. If the employer was not insured, we'll send out a letter [and copy the employer] informing the claimant that his claim is being accepted into the Fund. Now that does not mean it is compensable. As you can see in the rule we will then forward it on to our TPA to determine actual compensability. We are just making the initial determination as to whether in fact there was an insured employer employing this injured claimant at the time. On the other hand if we determine that the employer named in the application was actually insured at the time we will send out a letter denying acceptance into the Fund saying that our investigation indicates that your employer was insured at the time and we will do our best to direct that claimant to who the appropriate insurer is so they can file a claim with the appropriate insurer. So, in a nutshell that's what we have in Section 4. If there are any questions as I go through this please feel free to. . .

Mr. Pellish: I've got a couple of questions. Could you cite me some examples as to why an employer can be operating without insurance?

Mr. Sims: Well, there are a number of examples. We are certainly unique in that regard. It occurs in every state unfortunately, other than Texas which doesn't have mandatory workers' compensation anymore. One example would be where an employer starts up its business, decides not to obtain any licensure of any kind – not a business license from the Department of

Revenue, not any other types of license it might need. It might be a resource extraction company. It might be a contracting company. We refer to them as "rogue" employers – basically an employer that just decides to start business without picking up any kind of insurance, any kind of licensure and just kind of operate under the radar now.

Mr. Pellish: Are they operating legally or illegally?

Mr. Sims: They would certainly be operating illegally in that scenario I just described to you. Any employer needs to obtain a business license. If you are doing timbering you need to obtain a timbering license from the Department of Forestry. If you are coal mining you need to obtain a mining permit. There are all kinds of licenses issued at various agencies throughout the State. In order to legally operate any business you have to carry unemployment compensation insurance; you have to carry workers' compensation insurance. So, it would certainly be illegal. We are working right now at the Insurance Commission on creating a team to do our best to monitor employers. But as you can imagine it's pretty difficult to monitor every single employer. Again, I feel pretty safe saying the problem of uninsured employers – employers operating without workers' compensation insurance – is not a unique problem to West Virginia. Every state other than Texas that requires mandatory workers' compensation coverage has this problem. It's just a matter of how you try to find out the employers that are operating illegally and you try to shut them down as soon as you can. We can get injunctions against them and shut them down. It's a matter of finding out about them.

Another example would be if they are insured but decide to stop paying their premium. That will happen. We have a process in Rule 11 already in place where BrickStreet is to communicate that to us immediately. Then we immediately begin to take action against that employer, such as putting a posting on their front door saying they are uninsured; informing their employees that they are wide open for liability; that their employees can sue them. We can and will seek an injunction against them to shut them down. It is just a matter, Mr. Pellish, of the resources available to shut these employers down, but we're doing everything we can at the Insurance Commission to beef up our Employer Enforcement Program – working on getting investigators out there in the field; trying to work hand in hand with other agencies to find out who is not getting the proper license. A lot of times if they didn't get a business license they probably didn't get their workers' comp; didn't get their employment compensation. It's an ongoing struggle, but it's something that absolutely can be done. You are never going to be perfect, just like Judge Leach said about litigation. You are never going to have "0" litigation. I don't think you are ever going to have "0" employers that are operating illegally without insurance. What you can do is try to do your best to put together a program involving all your resources – investigators, credit analysts, everybody – to try to go after them and do the best you can to shut them down.

Mr. Pellish: Thank you.

Mr. Sims: Moving onto Section 5, Irrevocable Assignment of Subrogation Rights. Under the Uninsured Fund there is a section in the Code [to make a claim against the Uninsured Fund]

where the claimant has to assign to the Insurance Commissioner or really to the Uninsured Fund – the Insurance Commissioner is the administrator of it – but they have to assign to the Uninsured Fund a right to be subrogated as to any other claim they might have out there against another insurance policy or another third party. For example, if they were in a car accident they may have a lawsuit against a party that hit them if they were driving while they were working. They have to assign a right for the Uninsured Fund to be subrogated up the amount of benefits we pay them. Essentially what that means is the Legislature created the Uninsured Fund or at least our interpretation is that the Fund was created as a "Fund of last resort." Meaning you can get workers' compensation benefits from it but if you have other valid claims against other parties we're going to subrogate against those claims to make sure that the Fund is made as close to whole as possible. So, if you recover the amount of benefits that you receive from the Uninsured Fund from another action or from another insurance policy, we are going to subrogate against it to make the Fund even so we don't have to try to access other sources of funding.

The next section is Section 6, Employer Liability. That section describes the liability that uninsured employers do have to the Uninsured Employers' Fund. Once one of their employees files a claim under the Fund and starts receiving benefits, employers are liable not only dollar for dollar for all benefits paid to their uninsured employees for a claim but they are also liable, as you can see in (a), (b), (c) and (d), for all administration costs. That is the cost we pay our administrator to administer those claims; all attorney fees related to the defense of claims. If we have to defend the claim the employer has to reimburse us for those attorney fees, and (d), "interest on the above expenditures. . ." We can go after the employer – all their assets and all their owners and officers' assets for every penny we spent from the Fund on behalf of a claim of one of their injured employees, and we intend to do so.

Chairman Bayless: I was going to bring that up. I think in either five or six you ought to put something in there about owners and officers to make sure that everybody knows. They can't, "oh, we didn't know." It won't make any difference if they didn't know. But if you put, "Pursuant to West Virginia Code. . .an employer, its owners or officers. . .etc." Just to make it crystal clear because owners or officers are not mentioned in there.

Mr. Pellish: Mr. Chairman, I agree completely. And where I was going with my question to you is this thing is too gentle from my point of view. There ought to be a hammer being wielded here in terms of what we are going to do to shut down people who are not in compliance and go after them completely. Absolutely there is a need for this to protect the individual worker for any injuries, and I think this needs to be much stronger.

Mr. Sims: I'm not necessarily disagreeing with you but I will point out that in Rule 11 we've addressed a lot of these employer enforcement issues in there, such as what our remedies are against uninsured employers; such as seeking injunctions, making postings on their site, that type of thing. We were trying to limit this rule just to the Uninsured Employers' Fund and the administration of that process. I think there is some pretty strong language actually if you review Rule 11 in regard to what you are talking about.

Mr. Pellish: Do me a favor and send me a copy so I can take a look at it.

Mr. Sims: Absolutely.

Mr. Slater: Ryan, can you tell us what is the hierarchy and resolution on Title 11? What is the first step to find out that someone is operating without a license, etc.? What happens first?

Mr. Sims: The first step is we put them on our default list. There are two default lists. We have the Commission Default List which is a default list where all employers that were in default to the workers' comp fund prior to January 1 could not get insurance from BrickStreet. They were on that default list right away. Additionally other employers that we find out that never were insured, like I was explaining, we call "rogue" employer. We'll put them on the Commission Default List. We also have a separate default list that is described in Rule 11 entitled the "Private Carrier Default List" or "Private Market Default List." That is for those who actually had insurance from a carrier but then stopped paying their premiums. So, the first step is as soon as we find out that they are operating illegally we will place them on one of the default lists. And again this is set forth fairly thoroughly in Rule 11. In this rule it is also set forth in Section 6.2. Once you are on the default list you are subject to many different adverse sanctions by the Insurance Commission. I mentioned the postings. We go to your front door and post that you are uninsured. Tell all your employees that they can sue you if they are injured at work. That is something employers do not want obviously. We will file an action for injunction against the employer in the Circuit Court of Kanawha County. There was a Bill passed recently by the Legislature during the regular Session which made it clear to Circuit Judges that injunctions are mandatory. There is absolutely no discretion on the part of the Circuit Judge to deny an injunction if we can show that the employer is uninsured, is operating illegally. It says "The Circuit Judge shall grant the injunction. . .," meaning shut the employer down. It does take some time. I do not do the injunctions, but I think you can get the first hearing within a month to two. The Judge will grant the injunction and then it's a matter of following up – send an investigator out; making sure they are complying with the Judge's Order; and then you can ultimately get the sheriff to put a padlock on. You can ultimately have people arrested for contempt of Court if they continue to operate. There are all those remedies out there. I think if you look at 6.2 (a), (b), (c) and (d), that touches upon a lot of remedies. The posting is in (b). The penalty of a sum up to $10,000.00 – that's another remedy we have against those that default to private carriers. We can fine them and we do fine them automatically twice the amount of premium they owe during that term. It is fine they immediately receive and owe before they can become a good standing employer again.

Mr. Pellish: Ryan, it is somewhat a matter of perception as to how you read this. When I see the injunction all the way down as point (d), it doesn't strike me as having as much strength. I'd have the things flip-flopped.

Mr. Sims: Okay. We could certainly do that.

Mr. Slater: But does this deal, Ryan, with any company that is in default or just with people that are the "rogue?"

Mr. Sims: No. This is any employer that defaults for any reason. Any employer that is not carrying workers' compensation coverage for any reason – whether they didn't pay their premium; whether they never were insured in the first place; whether they still haven't resolved their issues with the Old Fund; they might default under a repayment agreement; they might be in a repayment agreement with the Old Fund but then default to it – then they get placed on the default list. There are a number of reasons.

Mr. Slater: Based on that it seems like the State. . .there should be some measure of good faith to go to these folks and try to work out a solution as opposed as to automatically file a suit of some sort against them. A lot of these companies employ a lot of people, a lot of jobs. If you go into the marketplace and you take all these out, then we're in big trouble. It not just affects workers' comp but it affects our tax system. It affects many other things that we do in the State. While I don't disagree putting this on "rogue" employers that are trying to skirt the law, come in and come out without paying taxes, without paying registrations fees, licensure fees, I would be opposed to automatically filing suit against a company without at least having some type of discussion.

Mr. Pellish: I think my comments – and you make a good point – I am taking shots at the "rogue" employers primarily. There may be valid reasons where you have an argument going on as to whether or not somebody is in default and for what reason. But even in those cases somebody ought to pony up some money just to make sure there is coverage there.

Chairman Bayless: What happens. . .I'm a good employer. I've always had workers' comp for the last 20 years. Something happens and my insurance company goes bankrupt and the next day four employees fall off the scaffold on the job; absolutely related; no problem. But my insurance company is not there. Am I uninsured? Are my officers and directors liable?

Mr. Sims: Just to get some clarification on the question. You are asking if your workers' compensation insurance company goes bankrupt.

Chairman Bayless: Yes.

Mr. Sims: There is actually a separate fund for this, Chairman Bayless. It's referred to as the "Private Carrier Guaranty Fund." It is also found in Article Two. I believe it's §23-2C-9.

Chairman Bayless: I just didn't want to end up being a criminal.

Mr. Sims: You wouldn't be considered uninsured. What happens when insurance companies go bankrupt they go into something called "receivership." You all probably know

that. It's a little different than bankruptcy. If it was an in-state company, we would handle it. If it's an out-of-state company, the domestic state where they reside will handle it. Through the NAIC, the National Association of Insurance Commissioners, has always handled. . .claims are paid until there is no money left and then there is the Guaranty Fund.

Mr. Pellish: Just to clarify. My main concern is the "rogue" employers or somebody who wants to flaunt the law. Forgive me for saying this, but to me that's unconscionable.

Mr. Sims: I would certainly agree with you on that. And just to comment briefly on what you were saying, Mr. Slater. Your comment on trying to work it out with employers, we certainly try to do that. The filing of an injunctive action doesn't grant the injunction. We always make every effort. What we've really focused on so far are the ones that owed money to the workers' comp fund. We are going to be filing injunctions very soon against employers that defaulted to BrickStreet who were in good standing on January 1. What we always try to do is resolve it. We try to give them an opportunity to pay the money they need to pay to get right again. Pay the fine off. If they defaulted to BrickStreet, they would pay the fine off to us and then get their insurance policy straightened with BrickStreet and get insured again. We make every effort to negotiate with them. We don't just file the action, never talk to them, walk into Court and ask the Judge to shut them down. "Rogue" employers are different. The employers that just have some trouble paying their premium for whatever reason, our goal is to get them re-insured. That's a bad term because it has different meanings. But to get them insured and back to good standing before we have to shut them down. So there is sort of a balance there. Section 6 discusses the direct liability to the Fund as well as all the other ramifications for not paying off your liability to the Fund.

Section 7, Methods for Determining and Collecting Employer Liabilities Owed to the Fund. That basically sets forth the various methodologies the Insurance Commission can use for calculating employer liability to the Fund. As you can see there are a number of options there ranging from an ongoing agreement where we issue pay orders every time we expend something from the Fund. For example, say there is an employer like Mr. Slater was talking about that just missed their payment once, got back to being insured, but had a month gap where it was uninsured and had one claim come in. Maybe there was a clerical error; maybe they just had one bad month financially but they are insured again. However, they have an ongoing obligation. An uninsured claimant came in while they were still uninsured. We would enter into a repayment agreement with them making it clear they are obligated to continue to pay that claim until it is paid off. They would essentially become defective self-insureds until that claim is paid off, and as long as they continue to make their claim payments for that uninsured claim – really reimbursing the Fund is what they do. It's a little different than self-insurance. They would be reimbursing the Fund. We would make a claim payment but they give us a check for it. That's one way. Another way would be going after the company. For example, the company is in default for a month but then they get straight again. No claims came in at that time. But as you know claimants have I believe six months to file. . .six months or a year. I'm not sure. There is a time limitation. Say a claim comes in later but they were uninsured during that period. They are now insured. They've gotten straight, but then a claim

comes in during the period they were uninsured. What we would do is send them a letter explaining that the claim has come into the Uninsured Fund which they are liable dollar-for-dollar for the benefits we paid for it. We explain to them we will be sending them pay orders to reimburse the Fund. As long as they are in compliance, they are fine. If they become non compliance again, we would go after them. We would have their insurer withdraw their insurance and take proper steps against them.

Another methodology discussed in here. . .this is more for employers that really are in bad financial shape, probably aren't going to get insured again. What we can do is create an actuarial estimate of what the claim might be worth and reduce that to judgment. If they are going bankrupt, maybe even file a claim in bankruptcy court for that amount so we can recoup something from the Uninsured Fund.

There might be another situation where this occurs. In some scenarios an employer wants to pay all of its liability right away. Again, suppose you have an employer that is in pretty good financial standing, but for a clerical error or an accounting problem misses a month and becomes uninsured for month and they have one claim hit the Uninsured Fund. We can reduce that to an estimated actuarial amount and they could buy it all out at once. They could pay us the full amount into the Fund so we will have enough money to pay off the claim. So there are two scenarios where we might use that methodology which is basically stated in 7.3. We also have the discretion as stated in 7.4 to settle amounts. There could be a time when it is determined to be beneficial to the Fund to settle the amount. Possibly waive interest or waive amounts to get most of what is owed to us right away. There could be various reasons why we want to settle.

Finally, Methods for Determining Assessments for the Fund – I would suggest to you that we will probably receive more comments on this section than any other section because it directly affects a lot of the employer community. This is basically the last resort of funding for the Uninsured Fund. If we are not able to recoup it through subrogation and through going after the bad acting employers, the Legislature gave us an opportunity to assess the employer community to replenish the Fund as needed. As you can see if you read this section, it enables us to create. . .based on actuarial estimations, it appears that there is a deficit balance in the Fund. . .I mean it might have money in it at the time but if we projected there is a deficit balance, we are permitted to create assessments against the employer community to replenish the Fund up the amount that will be necessary to make payments from it in the future. So that methodology is described in Section 8.

Section 9 is the Severability clause, a standard clause in all the rules stating that if one portion is deemed to be unconstitutional the rest of the rule applies.

Chairman Bayless: Does any member of the Commission have any questions?

Mr. Slater: Our discussion a moment ago about the resolution process. On Section 6.2, should we consider or is it viable to have two separate sets of criteria for the offenders, different class of offenders? As we talked "rogue" versus. . .

Mr. Sims: I guess what you are asking is do we want to treat "rogue" employers – and again that's just a term we essentially made up within the Insurance Commission. It has absolutely no legal meaning or has never been used in a court case to my knowledge. What you are asking is do we want to treat these employers that are out there and have never been discovered, never paid anybody anything. . .

Mr. Slater: If we use "rogue, shock of conscience" in there. I like that quite a bit. . .

Mr. Sims: We might be able to work that out for you, Mr. Slater.

Mr. Slater: To add a little bit of beef behind our comments. . .if we could come up with two separate sets. There would have to be some definition as to what this "rogue" employer would be. But to me there is a separate definition for those and a separate consequence for each. When you have folks that are deliberately skirting the law and you have others, either through poor financial performance, through other things that have happened and find themselves falling behind – they can't make payments. There is a good faith effort by the State to try to get that worked out versus folks that are really trying to take everybody for ride. . .different criteria. . .

Mr. Sims: I would certainly agree with you on the statement that there should be a difference in policy as to the way overtly bad acting employers are treated versus employers that run into a little bit of financial trouble. . .probably are able to get on their feet. Obviously this type of policy ultimately will be up to the Commissioner and you all. The Legislature gave us these remedies to all employers without coverage. Whether it's because they were in financial trouble or because they are just operating out there, they're total bad actors. I think what we do have is the ability to use some discretion on which ones to apply. We are going to come harder at you if you're a "rogue" employer than if you are an employer that just ran into a little bit of trouble. We like the way where we have all these remedies. We certainly want to use discretion in trying to do our best to determine – is this a bad acting employer that really doesn't give a flip or is this an employer that has run into some financial trouble but likely can get back on their feet? There is some ability in there. . .fines, that type of thing, and just working with them if there is a pending injunction. If we do differentiate between them, I think it would be better stated. . .better placed in Rule 12 when we get to that, and we will at some point get that before you. In this rule we are trying to sort of focus on just the uninsured employers' fund and try to keep everything we have in here.

Mr. Marshall: Mr. Chairman. . .Ryan, let me ask you something. Does our body even have the power to address the policy side as to how the Insurance Commission utilizes its enforcement powers? Or is that basically administrative and outside of our purview? We would probably arrive at a consensus of certainly the Commission should take a much sterner hand in

dealing with the so-called "rogue" employers than employers that are generally in good standing and have a temporary problem. But I'm not sure that we have the power to actually tell the Commission how to do that, and it would probably be something we'd like to know whether we have the power or not.

Mr. Sims: I've reviewed this section, the statutory authority creating the Industrial Council. I think you do have the ability to provide the Insurance Commissioner guidance on certain issues. The practical solution to what you just suggested. . .I hear you saying that you want some differentiation made between "rogue" employers and other employers. I think the solution, again, like I told Mr. Slater, would be you telling us that, which you have in the minutes, and then us going to Rule 11 and addressing that in the proper rule which would be Rule 11.

Chairman Bayless: You could just have a sentence that the Commissioner will take into account all circumstances surrounding why the employer. . .

Mr. Sims: The reason we have you all is to provide some guidance on how to move forward on this new workers' compensation market. We certainly have your minutes and I personally can tell you I review the minutes on a regular basis and any time you make a suggestion we take it to heart.

Mr. Slater: Mr. Chairman, I don't think that would get it for me anyway. I think there needs to be a clear differentiation and spelled out some definitive guidance as to that differentiation between those two different classes of companies, offenders. I would like to push in that direction as opposed to some general language that doesn't provide much guidance.

Mr. Sims: That is a well taken point and certainly something we'll look at when we get to Rule 11.

Mr. Pellish: I support you in that completely.

Chairman Bayless: Are there any more comments from the Commission? To the members of the public we'll take comments now. As you saw on Rule 12 on "unconscionable," they really do listen. Many members of the public had meetings with the staff, letters, e-mails and everything else. So your comments are taken and they really pay attention. If any member of the public would like to get in any preliminary comments on this, you are more than welcome to submit them in writing and they will be listened to. Do we have a sign up list?

Steve White (Director of Affiliated Construction Trades): If I could just follow from that. I can go to any city, probably any county any day and find you companies that are operating illegally. While I think the Insurance Commission and BrickStreet – and Workers' Compensation prior – has done a good job in beefing up enforcement, it is still not where it needs to be. When I hear that we have to back off a little bit, well, I'm sensitive to those things. You have to understand that there are a lot of things that take place before someone gets on that default list. And even when these things are implemented there are plenty of opportunities for people to

come into repayment agreements and do many things. So, I don't think this is lowering the boom so much. I'm all for going after the "rogue" employers, but they are here. They are slippery. I would suggest – back to some of the comments – that you folks, and I would like to see as well, some numbers and statistics about how this enforcing effort is going on. I just took some notes and we've heard that fines can be assessed. Well, how many fines have been assessed? How many fines have been collected? I've heard that businesses can be shut down. How many have been shut down? I like to know. I've heard injunctions. I've heard about postings. How many have been posted? I don't know and I don't have a feel for what is really going on out there. I think it would be very valuable for us to know those things so we can assess. How many have been placed on default? We have a default list. How many are placed on default? So, these are maybe some statistics that would help us gauge what's going on in that enforcement area. It would certainly help our group.

I would like to point out a "rogue" employer that I think is a "rogue" employer because I was here in March pointing out they are on the default list and they were working on a project. It actually turned out to be financed by your and my tax dollars – a housing fund project. On the default list for workers' comp – under their current name, under their prior name, under the prior before that and another name – four different a.k.a.'s. We turned them in. Yes, they ran down and they got right with workers' comp which is a good thing. They paid up whatever, got on a repayment plan. We found them on another project and checked. And, yes, lo and behold they are okay. They are off the list. But we found out subsequent to that that they signed up for one person as the masonry contractor. Mr. Dean will know. It's a pretty energetic masonry contractor that can operate with one person to build an apartment complex. In fact we know the Department of Labor cited them for not having a proper wage bond when they had nine people on the job. So, you've got nine people on a job on their wage bond with one person under workers' comp. So, there is your "rogue" employer out there who knows the system, knows how to skirt it. I've talked to the Insurance Commission folks. How do we use this as a good test pattern? Yes, you can see that they've paid up from BrickStreet, but you can't see how many people they have on their system. I've informed BrickStreet and I hope they're on to them. So this "rogue" situation. . .it's not a large number, but they are a persistent number and they cause a lot of problems. It is a big concern for us, particularly in the construction industry. I want to emphasize – any day of the week you give me the city and I'll go find them for you. They come in from out of town. They are homegrown. They used to have a business under one name. Now they are under another name because they can hit and run. They are not like a lot of industry. You've got a physical plant there and you know you're there. In the construction industry and I would assume in others. . .obviously the coal mining industry was the poster child for it. In fact when we had all the leniency about poor businesses, we didn't want to put them out of business. That's how we rolled up billions of dollars worth of debts. So I just caution you about that approach. I think there are a lot of things that you need to review first. There are a lot of things in place that these companies already have. I mean they are getting notices, etc., before they get to this default. So, it's not like oh my gosh I didn't even know I was in default. That's not the case.

One other point I would like to make. It would be helpful to myself and perhaps to others. When I look at Rule 9 I don't really remember or have the recall – what was the current policy and what has changed in this policy? You know in the legislative process we've got the underlines and strikethroughs and you can see what's in the proposal what's new. As I looked through, I had some comments and some people here I know has a lot of good knowledge and they filled me in and answered half of my questions in about two minutes. But there are a lot of issues here and I will continue to ask those questions, but I thought it might be helpful for all of us if we had some sort of analysis. Here's what is new in this or something new that we are addressing. I will point out one thing and I'm sure I'll get an answer after the meeting. Section 7.4 allows the Commissioner the discretion to waive amounts owed to the Fund. And it is my understanding in the past that you were not allowed to waive the premium owed. You might have been allowed to waive the penalty, but not the premium. Is this a new thing that you are now being asked to go and give the Commissioner more authority? I think that would be valuable for us to know.

One last point for general comment and that is I was a little surprised not to see a discussion here of the new NCCI rates that were just announced. It's kind of a milestone in the whole transition and I think the BrickStreet folks and the Insurance Commission should get credit for this accomplishment moving from our less than 100 categories to many hundred. But it is also a point of confusion for many of us. The more we can get that information out about what the new loss cost rates – a new term – how they will affect the businesses that operate here, I think we could all benefit from continually hearing about these things. Thank you very much.

Chairman Bayless: Thank you, Mr. White. Any other member of the public have comments that they would like to offer at this time? The staff does take these comments seriously. Get them in.

We need a motion now to approve this rule for its initial filing.

Mr. Dean made the motion for approval to file Rule 9 for public comment. The motion was seconded by Mr. Slater and passed unanimously.

Chairman Bayless: It is approved.

## 7. General Public Comment

Chairman Bayless: Does anybody have any comments on any subject pertinent to the Commission?

## 8. New Business

Chairman Bayless: Is there any new business to come before the meeting.

Ms. Pickens: I just wanted to let you know that last week I spoke to Rita Hedrick Helmick who is on the Board of Review. I know she was at the Organizational Meeting when this Council was first put in place and she may have been at some early meetings and made a presentation. She just wanted to repeat that if you all want her present at the meetings, she is happy to be here. If there are any particular questions or information that you want them to supply on an occasional or a routine basis, she is happy to do that. So I told her when it came up for new business I would mention that to the Council.

Chairman Bayless: Let me ask a question of Judge Leach. I was looking to see if he was here. I just wondered on the information that Mr. White brought up on how many people have been fined, how many people have had inunctions, how many people defaulted and had bad notices posted on their door, would that be hard to get as part of the monthly summary report?

Alan Drescher: That is not information that our office would have.

Chairman Bayless: Who would have that?

Melinda Kiss: We can certainly prepare a report on that. We fine all employers as a matter of course for being uninsured as soon as we find them uninsured. Commissioner Cline and Mr. Kenny made the decision that that premium amount would be twice the amount of the premium that they had owed to BrickStreet. We wanted it to be more expensive to be uninsured than it is to have insurance. So we are fining people routinely. We are collecting them and we will be happy to get a report for Council next time.

Chairman Bayless: Thank you. Is there any other new business to come before the meeting?

Mr. Dean: I would like to see the rates. Is there any way we could get a copy of the rates?

Chairman Bayless: It shouldn't be a problem. Is it on the net?

Mr. Slater: The new NCCI rates. . .

Ms. Kiss: I don't know if they are on the Internet yet. They have actually made some presentations at some meetings all over the State and. . .we can bring that and present it to you.

Chairman Bayless: Very good.

**9. Next Meeting**

Chairman Bayless: The next meeting is Thursday, July 20, 2006, at 3:00 p.m., Charleston Civic Center.

**10. Executive Session**

Chairman Bayless: We are now going to consider some applications for self-insurance. Does anybody have anything else? The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. I now entertain a motion to go into Executive Session to consider matters relating to self-insured employers. If there is any action taken regarding these specific matters for an employer, this will be done upon reconvening of the public session. Do I have a motion?

Mr. Marshall made the motion to go into Executive Session. The motion was seconded by Mr. Pellish and passed unanimously.

[The Executive Session began at 4:30 p.m. and ended at 5:50 p.m.]

Chairman Bayless: We are back in to public session. We have discussed in the Executive Session some matters concerning the financial statements and the applicability and eligibility for people for self-insurance. The first matter that comes up is the Resolution concerning the application for Heartland Employment Services, LLC. They have applied for self-insurance status. Do we have a motion on that?

Mr. Slater: So moved.

Mr. Marshall: Second.

Chairman Bayless: It has been moved and seconded that based on the discussion and the facts that emerged during the Executive Session that Heartland Employment Services, LLC, be granted self-insurances status. All in favor signify by saying "aye." (Motion is passed.)

The next is a motion concerning the annual review of self-insurance status of companies that are self-insured. The Self-Insurance Unit has provided notification to each employer in the recommendation and there is a Resolution that lists the employers and amount of the security requirement required. Exhibit A to this Resolution lists the names of the companies:

| | |
|---|---|
| Northwest Pipe Company | $ 1,394,507.00 |
| Steel of West Virginia, Inc. | $ 4,155,024.00 |
| Virginia Electric & Power Company | $ 1,349,871.00 |
| Wheeling Pittsburgh Steel Corporation | $10,961,955.00 |
| Healthsouth Corporation | $ 1,186,416.00 |
| U. S. Silica Company | $ 1,192,509.00 |
| Wheeling Park Commission | $ 1,706,418.00 |

Chairman Bayless: Do we have a motion?

Mr. Marshall: Mr. Chairman, I so move the Resolution.

Mr. Slater: Second.

(Mr. Pellish abstained on U. S. Silica because of an interest in that company.)

Chairman Bayless: All in favor signify by saying "aye." Opposed? (Motion passed.) I think that is everything. Is there anything else to come before the meeting?

Mr. Slater made a motion to adjourn. The motion was seconded by Mr. Marshall and passed unanimously.

There being no further business the meeting adjourned at 6:00 p.m.